INDEX

Petition

	Page
Summary statement of the matter involved	2
Jurisdiction	8
Statutes	8
Questions presented	9
Specification of errors	11
Reasons for allowance of the writ	11

Brief

Point I—The District Court for the District of Delaware upon the determination of the motion to dismiss committed error in going dehors the allegations of the complaint, which are taken as true upon such a motion	13
Point II—The decisions below erroneously limited and restricted the jurisdiction of the Federal Court and denied the Pennroad Stockholders the protection of court approval of the settlement to which they were entitled in the Overfield-Weigle case under Federal Rule 23(c)	15
Point III—The decisions below erroneously denied the plaintiff her option to resort to the Federal Court for the relief to which she was entitled	17

Table of Cases

Baltimore & Ohio Railroad Co. et al. v. *Wabash Railroad Co.*, 119 Fed. 678, C. C. A. 7	17
Bank of United States v. *Deveaux*, 5 Cranch 61, 3 L. Ed. 38	11, 17
Becker Steel Co. v. *Hicks*, 66 F. (2d) 497	16
Burget v. *Robinson*, 123 Fed. 262	16
Cool v. *International Shoe Co.*, 142 F. (2d) 318	14
Dickheiser v. *The Pennsylvania Railroad Company*, 5 F. R. D. 5	12, 15
Doench Duhme & Co. v. *Federal Deposit & Insurance Corporation*, 315 U. S. 447, 62 Sup. Ct. 676	17

Page

Ex Parte Craig, 274 Fed. 177 16
Grodsky v. *Sipe*, 30 Fed. Supp. 656 13
In re Carlisle Packing Co., 12 Fed. Supp. 11 16
Ledbetter v. *Farmers Bank & Trust Co.*, 145 F. (2d) 147 14
Massachusetts Mutual Life Insurance Co. v. *Grossman et al.*, 4 Fed Supp. 990 13
Mullens, et al. v. *DeSoto Securities Co., Inc., et al.*, 136 F. (2d) 55 13
Noonan v. *Fruco Const. Co.*, 140 F. (2d) 633 14
Omaha Electric Light & Power Co. v. *City of Omaha*, 216 Fed. 848 16
Rozelle v. *Quinn*, 47 Fed. Supp. 740 13
Winkelman v. *General Motors Co.*, 48 Fed. Supp. 490 16

STATUTES AND AUTHORITIES CITED

Federal Rules of Civil Procedure, Rule 23(c), U. S. C. A., Title 28, Foll. Sec. 723(c) 9
Title 28, U. S. C. A., Sec. 723(b) 8
Section 240, Judicial Code, 28 U. S. C. A., Section 347 8
Rules 35 and 38 of the Circuit Court of Appeals, Third Circuit 16
Equity Rule 29, 28 U. S. C. A., Foll. Sec. 273 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 603

MATILDA J. FELDMAN,

Petitioner,

vs.

PENNROAD CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review its decision and judgment rendered on May 21, 1946 (R. 47) in Matilda J. Feldman *vs.* Pennroad Corporation, a corporation of the State of Delaware, 155 F. (2d) 773, which affirmed the order of the United States District Court for the District of Delaware granting the motion of the defendant dismissing the amended complaint

which said judgment of the District Court was filed May 25, 1945. The District Court denied reargument on June 13, 1945. The District Court's opinion appears at 60 F. Supp. 716.

Summary Statement of the Matter Involved

Matilda J. Feldman, the petitioner, is a stockholder of Pennroad Corporation (hereinafter called "Pennroad").

By petition sworn to March 8, 1945, Pennroad Corporation applied to the Chancery Court of the State of Delaware for a hearing on the approval of a proposed settlment with the Pennsylvania Railroad Company of certain pending litigation. The Chancery Court set April 23, 1945, as the return day for the hearing on the proposed settlement.

On April 16, 1945, Matilda J. Feldman commenced an action in the United States District Court for the District of Delaware in which she sought *inter alia* the appointment of a receiver for Pennroad with power to prosecute suits on behalf of Pennroad and for an injunction against the making by Pennroad of any settlement or other disposition of its claims against the Pennsylvania Railroad Company, its directors and officers.

The amended complaint, against which the motion to dismiss was directed, alleged as follows:

That there is diversity of citizenship between the parties; that the matter in controversy is in excess of the jurisdictional value and that the plaintiff is acting not only for herself but in behalf of the holders of approximately 10,000 shares of stock of the defendant (paragraphs 1 to 3 inclusive).

That The Pennsylvania Railroad Company (hereinafter referred to as Pennsylvania) in order to extend its influence and build up its railroad empire by acquisition of controlling blocks of securities in various railroads which

it was unwilling to acquire for its own account because the securities thereof were highly speculative, the prices demanded therefore were excessive and such acquisitions by it were illegal and contravened the laws of the United States and the rules and regulations of the Interstate Commerce Commission, organized the defendant to make such purchases and caused the defendant to sell its securities to the general public; that the plaintiff purchased such securities in 1929 and has continued to hold such securities ever since and was therefore the owner of such securities during the times of the commission of all the wrongs complained of in the complaint (paragraphs 4 to 6 inclusive).

That in furtherance of the aforesaid unlawful plan and conspiracy, Pennsylvania in 1929 caused a ten year voting trust covering all the securities of the defendant to be entered into and that the voting trustees were officers of Pennsylvania and that therefore Pennsylvania had complete domination of the defendant without any investment of any kind, nature or description therein, and the public, with an investment of approximately $140,000,000 had no control or influence of any kind and in fact under the provisions of the certificate of incorporation and the by-laws, was precluded from even securing information concerning the operation of the defendant; that in the acquisition of securities the directors of the defendant were the dummies of Pennsylvania, exercised no independent judgment but merely carried out the mandates of Pennsylvania (paragraphs 7 to 10 inclusive).

That the directors of the defendant have at all times been and now are under the domination and control of Pennsylvania and that the defendant at no time has ever had counsel wholly independent and acting solely for the best interests of the defendant, but that to the contrary, counsel likewise have been under the domination and control of Pennsylvania and that all of the assets of the defendant

have been fraudulently and improperly used for the benefit of Pennsylvania and to the detriment of the defendant and its shareholders (Paragraphs 11 to 14 inclusive).

That in carrying out the aforesaid illegal and unlawful plan of conspiracy, domination and misuse of the defendant's funds, great losses have been caused to the defendant (1) by the acquisition of securities at excessive and fraudulent prices purchased without any regard to their intrinsic merit or value, but solely for the purpose of furthering the benefits to Pennsylvania; (2) by the operation of the companies whose securities were purchased as above for the benefit of Pennsylvania, and in violation of the rights of the defendant and its security holders, and (3) by incurring large underwriting expenses in the securing of funds which were not necessary for the defendant's business but which were necessary only to enable the defendant to secure securities as above described, desired for Pennsylvania and used for its benefits (paragraphs 15 to 17 inclusive).

That in order to secure restitution in part for certain of the wrongs above described three stockholders' suits were begun, two of which have been dismissed on the ground that the statute of limitations had run out but not on the merits. That the third is still pending and that the directors wholly controlled and dominated by Pennsylvania have at all times resisted the prosecution of such suits to the detriment of the defendant to prevent its securing redress for the wrongs perpetrated (paragraphs 18 and 19).

That none of the aforesaid suits has been brought to compel an accounting for profits illegally made or wrongful acts done subsequent to the acquisition of the shares hereinabove described, the last of which acquisitions took place in June, 1931 (paragraph 20).

That in furtherance of the aforesaid conspiracy and scheme, Pennsylvania is now endeavoring to foist upon the

hapless, defenseless defendant corporation a wholly inadequate settlement of $15,000,000 in complete satisfaction and discharge not only of the wrongs in respect of the acquisitions for which the aforementioned three stockholders' suits were brought, but in addition for wrongs perpetrated subsequent to such acquisitions and for which no relief has been sought in the pending stockholders' suits and endeavoring to dismiss pending suits; that the directors of the defendant corporation who are completely dominated and controlled by Pennsylvania have joined with Pennsylvania to carry out such illegal plan and purpose by entering into an agreement of settlement and by endeavoring to secure judicial approval therefor by petition filed with the Chancery Court of the State of Delaware (paragraphs 21 to 23 inclusive).

That the attempt of the defendant to condone the wrongs of Pennsylvania and its own directors by the consummation of the proposed settlement may not be achieved without the consent of the plaintiffs in the three pending stockholders' actions and should not be permitted without a full and complete disclosure of all material and pertinent facts to approximately 100,000 holders of 6,000,000 shares of the defendant's stock presently issued and outstanding (paragraphs 24 and 25).

That as the directors of the defendant are controlled and dominated by Pennsylvania it is impossible for them to adequately protect the interests of the stockholders before the Chancery Court of Delaware or before any other court and it is therefore essential that an impartial receiver or receivers be appointed not only to consider the merits of the proposed settlement but to make a full investigation in respect thereto and to make fair and proper presentation in respect of any application to confirm or approve the same, or in the event such investigations should justify

the same, to institute such other actions or proceedings as may be warranted or necessary for the protection of the rights of the defendant and its security holders (paragraphs 26 to 29 inclusive).

That the merit of the defendant's claims against Pennsylvania has been established in the actions now pending in the United States District Court for the Eastern District of Pennsylvania and by the dissenting opinion of Judge Biggs, Jr., Senior Circuit Court Judge (paragraph 30).

That the plaintiff has no adequate remedy at law and unless the acts of the defendant and its directors are stayed and a receiver appointed, the plaintiff and other stockholders of the defendant and the defendant itself, will suffer irreparable harm and injury. That demand upon the directors to institute this action would be futile and the action is not a collusive one to confer jurisdiction on the District Court (paragraphs 31 to 35 inclusive).

The Pennroad Corporation moved to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted. The District Court for the District of Delaware dismissed the complaint on May 25, 1945, refusing both an injunction and the appointment of a receiver.

In dismissing the complaint the District Court relied among other things on the following (R. p. 27a) which were *dehors* the complaint:

1. That there was nothing to prevent plaintiff from fully presenting the facts alleged in the District Court action to the State Court (Chancery Court of the State of Delaware).

2. That counsel for the plaintiff, Feldman, and counsel for Perrine during the argument of the motion allegedly said that the State Court had permitted them to present fully their objections to the settlement in the hearings there.

3. That the Court must assume that the State Court would do justice to all parties and if there is merit in the allegation presented in the District Court complaint that the State Court would grant adequate relief.

4. That the allegation of the complaint of the imminent danger of a collusive settlement would be persuasive if the settlement were contemplate dwithout court approval, but the Federal District Court must assume that Pennroad and its stockholders would be adequately protected by the hearings then to be held in the State Court *to obtain judicial approval of the settlement* (R. pp. 28a-29a).

Counsel for petitioner made a motion for reargument on June 4, 1945 on the ground that counsel had never stated upon the argument that the State Court had permitted them to present fully their objections to the settlement in the hearing there. Motion for reargument was denied on June 13, 1945.

On August 13, 1945, the Court of Chancery of Delaware approved the settlement and authorized the same carried out. The Vice-Chancellor in approving the settlement held that since he concluded that in entering the settlement the Pennroad Directors were free from disqualifying interests and acted in good faith, there was *no need for him to inquire into the merits of the settlement.* (43A 2d 721, 728).

On August 24, 1945, the plaintiff (the petitioner herein) filed a notice of appeal to the United States Circuit Court of Appeals for the Third Circuit from the order of the United States District Court for the District of Delaware dismissing the complaint of the petitioner herein.

In the Crcuit Court of Appeals the petitioner herein argued that the complaint stated grounds for a cause of action in equity and should not have been dismissed because of the assumptions made by the District Court that the Delaware Chancery Court would permit a full hearing on

the petitioner's objections and that Pennroad and its stockholders would be adequately protected. It was further argued that since the decision of the District Court had been rendered, the Delaware Chancery Court had entered an order on the opinion of the Vice Chancellor which established the fact that the assumption by the District Court was wholly erroneous, for in said opinion it was stated specifically that there was no need to inquire into the merits of the settlement.

Petitioner herein also argued in the Circuit Court of Appeals that Rule 23(c) of the Federal Rules of Civil Procedure had been violated inasmuch as the Delaware Chancery Court had approved an agreement of settlement providing for the disposition of actions pending in the Federal Court.

Thereafter, the Supreme Court of the State of Delaware handed down its decision approving the decree of the Vice Chancellor. On May 21, 1946, the United States Circuit Court of Appeals for the Third Circuit affirmed the judgment of the District Court for the District of Delaware.

Jurisdiction

1. The jurisdiction of the court is invoked under Section 240 of the Judicial Code as amended; 28 U. S. C. A. Section 347. The judgment of the Circuit Court of Appeals for the Third Circuit was entered on May 21, 1946 (R. 47). The time in which to present this petition for a writ of certiorari was extended to October 11, 1946.

Statutes

Title 28 U. S. C. A. Sec. 723(b). *Rules in actions at law; Supreme Court authorized to make:*

> "The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district

courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect. June 19, 1934, c. 651, Sec. 1, 48 Stat. 1064."

Rule 23(c) of the Federal Rules of Civil Procedure, U. S. C. A. Title 28, following Section 723(c), provides as follows:

"(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as to court directs. If the right is one defined in paragraphs (a) or (3) of subdivision (a) notice shall be given only if the court requires it."

Questions Presented

1. Whether the decision and judgment of the United States District Court for the District of Delaware affirmed by the Circuit Court of Appeals, which granted the defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted, was error.

2. Whether the United States District Court in adjudicating the motion to dismiss the complaint for an injunction to restrain Pennroad from seeking approval of the proposed settlement in the Delaware Chancery on the ground of failure to state a claim upon which relief can be granted, may consider matters *dehors* the complaint, especially where the plaintiff alleged that the Delaware hearing was

brought on by notice not calculated to afford a full and fair hearing in that court.

3. Whether a Federal Court may refuse relief to a suitor in a case where it has jurisdiction of the parties and subject matter on the assumption that suitable relief may be available to the suitor in a state tribunal.

4. Whether an action is pending in the Federal District Court when the District Court has rendered judgment in favor of plaintiff and the Circuit Court of Appeals reversed the judgment bu the mandate of the Circuit Court of Appeals has not gone forward to the District Court and (a) the time for filing petition for rehearing had not expired, and (b) the time had not expired for filing a petition for a writ of certiorari to this Honorable Court.

5. Whether parties to a class action pending in the Federal Court can settle the action in a court other than the Federal Court.

6. Can a United States Circuit Court of Appeals in determining an appeal from a judgment of the District Court dismissing the complaint for failure to state a claim make its decision upon consideration of facts which did not exist at the time of the decision in the District Court and which were not alleged in the complaint.

7. Can the United States District Court for the District of Delaware issue an injunction restraining interference with the jurisdiction of the United States District Court for the District of Pennsylvania in order to preserve the jurisdiction of said Federal Court for the purpose of insuring compliance with the Federal Rules of Civil Procedure and to prevent the circumvention of said Rules.

Specification of Errors

The errors of which petitioner complains and intended to be urged are implicit in the questions presented above and we respectfully request that the same be deemed incorporated herein as though set forth at length.

Reasons for Allowance of the Writ

1. The question presented by this case is an important question because it affects the proper procedure in the compromise and settlement of class actions in the Federal Courts, and if the present decision of the Circuit Court of Appeals is permitted to stand, it would seriously affect the Federal Court's jurisdiction to approve the settlement of class actions there pending.

2. Rule 23 (c) was formulated to place the compromise of class actions under the supervision of the Federal Court to eliminate unsavory practices of private, secret and collusive settlements. The question presented in this case presents the important issue as to whether a settlement of a class action pending in the Federal District Court may be maneuvered into the State Court so that the purpose for which Rule 23 (c) was promulgated is defeated and the protection for which it was designed is emasculated.

3. The writ should be allowed for the reason that the decisions of the Circuit Court of Appeals and the United States District Court erroneously limit and misinterpret the jurisdiction of the Federal Courts. The refusal to enjoin interference with pending litigation in a Federal Court upon the assumption that the suitors would obtain adequate relief in the state tribunal was a decision in conflict with the decision of this Court in *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 87; 3 L. Ed. 38, and other decisions of this Court.

4. The decision that the *Overfield-Weigle* case in the United States District Court for the Eastern District of Pennsylvania and the Circuit Court of Appeals for the Third Circuit was not pending, was a decision in conflict with the decision in *Dickheiser* v. *The Pennsylvania Railroad Company*, 5 F. R. D. 5 and other decisions of the Federal Courts and local and general law.

5. The decision of the District Court and Circuit Court of Appeals on testing the sufficiency of the complaint upon the motion to dismiss by reference to assumptions of fact outside the record was a decision in conflict with the decisions of this court, the Federal Courts, and well settled authority.

Respectfully submitted,

LEO BRADY,
MORTIMER S. GORDON,
Attorneys for the Petitioner,
Office & P. O. Address,
44 Wall Street,
New York 5, N. Y.

STEWART LYNCH,
804 Equitable Building,
Wilmington, Delaware,
Counsel for Petitioner.

HERMAN KELLER,
LEROY C. CURTIS,
GORDON, BRADY & KELLER,
44 Wall Street,
New York 5, N. Y.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

ARGUMENT

Point I

The District Court for the District of Delaware upon the determination of the motion to dismiss committed error in going dehors the allegations of the complaint, which are taken as true upon such a motion.

The motion to dismiss the complaint under Rule 12 of the Rules of Civil Procedure is limited to the allegations of the complaint and facts not appearing therefrom must be disregarded upon the motion. *Mullens, et al.* v. *DeSoto Securities Co., Inc., et al.*, 136 F. (2d) 55; *Rozelle* v. *Quinn*, 47 F. Supp. 740; *Grodsky* v. *Sipe*, 30 F. Supp. 656; *Massachusetts Mut. Life Ins. Co.* v. *Grossman, et al.*, 4 F. Supp. 990; Equity Rule 29, 28 U. S. C. A. Foll. Sec. 723.

In *Rozelle* v. *Quinn, supra*, at page 741 the Court said:

> "The motion to dismiss is limited to the allegations of the petition * * * facts not appearing therefrom must be disregarded upon this motion. (cases cited) * * * In accordance with the rule, the scope of the examination here will be restricted to the four corners of the complaint."

The District Court in its opinion assumed that the Chancery Court of Delaware would inquire into the merits of the settlement. The District Court in its opinion (R. p. 27a) said:

> "This Court must assume that the State Court will do justice to all parties, and, if there is merit in the allegations herein presented, that the State Court will grant whatever relief may be just and proper."

This assumption is wholly unsupported by anything found within the four corners of the complaint, the allega-

tions of which on the motion to dismiss must be taken as true and must be construed in the light most favorable to the plaintiff: *Cool* v. *International Shoe Co.*, 142 F. (2d) 318; *Ledbetter* v. *Farmers Bank & Trust Co.*, 142 F. (2d) 147; *Noonan* v. *Fruco Const. Co.*, 140 F. (2d) 633.

In *Cool* v. *International Shoe Co.*, 142 F. (2d) 318, the Court at page 320 said:

> "Plaintiff was entitled to a liberal construction of his complaint. We have held that on a motion to dismiss for insufficiency of statement, the complaint should be construed in the light most favorable to the plaintiff and with all doubts resolved in his favor. Leimer *v.* State Mutual Assurance Co., 8 Cir. 108 F. 2d 302. In Musteen *v.* Johnson, 8 Cir. 133 F. 2d 106, 108, it was held error to dismiss a complaint on the ground of insufficiency of statement unless 'it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim asserted by him.' "

The vice of dismissing a complaint on the basis of assumptions *dehors* the complaint is well illustrated by the instant case. Contrary to Judge Bard's expectations and assumptions as to the role and duty of the Delaware Court, that court flatly refused to inquire into the merits of the settlement. Vice Chancellor Pearson in approving the settlement held:

> "From the evidence, I conclude and find that in entering the settlement the directors were free from disqualifying interests, and that they acted in good faith. With that finding, there is no need to inquire into the merits of the settlement."

Thus litigation of vast importance is concluded without any inquiry into the merits of the settlement.

All of which points up the force and efficacy of the elementary principle that a complaint valid on its face may not be dismissed on motion.

Point II

The decisions below erroneously limited and restricted the jurisdiction of the Federal Court and denied the Pennroad stockholders the protection of court approval of the settlement to which they were entitled in the Overfield-Weigle Case under Federal Rule 23(c).

The petitioner argued in the District Court and in the Circuit Court of Appeals that Rule 23(c) of the Federal Rules of Civil Procedure, made it necessary for the Pennroad Corporation to apply to the District Court for the Eastern District of Pennsylvania for approval of the compromise agreement with the Pennsylvania Railroad Company for the reason that the agreement provided as a condition precedent to the payment of the money, that the Overfield-Weigle suit be so disposed of that the mandate of the Circuit Court of Appeals dismissing the suit should go forward to the District Court and the complaints dismissed in accordance therewith.

The petitioner also argued that the Overfield-Weigle suits were still pending in the District Court, a fact which was found by Bard, J., in *Dickheiser* v. *The Pennsylvania Railroad Company,* 5 F. R. D. 5, 10, where Judge Bard said as follows:

> "Complainants' allegation of fraud and neglect of duty on the part of the directors in approving the settlement is based on an erroneous interpretation of the legal effect of the Circuit Court decision in the Overfield-Weigle case. Complainants allege that the Overfield-Weigle case has reached final judgment. But how can this be true when the time for filing a petition for rehearing has been extended and is unexpired? There is no certainty that a petition for rehearing will be denied or that a petition for a writ of certiorari will be unfruitful."

That the action is still pending is amply supported by numerous cases in various Federal jurisdictions. Rules 35 and 38 of the Circuit Court of Appeals, Third Circuit; *Omaha Electric Light & Power Co.* v. *City of Omaha,* 216 Fed. 848; *Burget* v. *Robinson,* 123 Fed. 262; *Becker Steel Co.* v. *Hicks,* 66 F. 2d 497; *Winkelman* v. *General Motors Co.,* 48 F. Supp. 490; *In re Carlisle Packing Co.,* 12 Supp. 11; *Ex Parte Craig,* 274 Fed. 177.

As was said in *Omaha Electric Light & Power Co.* v. *City of Omaha, supra,* at page 855:

> "It is a universal rule that the perfecting of an appeal transfers the cause to the appellate court, and that it remains there until it is remitted to the trial court by the sending down of the mandate."

Apparently the Circuit Court of Appeals misconceived the argument with respect to rule 23(c). In its opinion the Circuit Court of Appeals held as follows with respect to the argument of the petitioner as the Court conceived it:

> "The plaintiff urges that in the federal court she is entitled to have the court itself consider the adequacy of the consideration. She calls attention to Civil Procedure Rule 23(c) which provides that "A class action shall not be dismissed or compromised without the approval of the court * * *". But this rule refers to action by the court in which the class suit is pending. It may well be that if the Overfield-Weigle suits had not been finally decided by this court but were still pending undetermined in the District Court for the Eastern District of Pennsylvania and an application had been made to that court for leave to dismiss them pursuant to a compromise settlement that court would have had authority to consider independently the wisdom and sufficiency of the settlement. The court below, however, was not in that position. No class suit was pending before it. * * *"

The petitioner herein did not urge in the courts below that the Delaware court could consider the settlement provided it followed the procedure laid down by the Federal cases interpreting rule 23(c). The petitioner urged that the existence of rule 23(c) made it impossible for the Delaware courts to consider or approve the settlement at all in the light of the pendency of the Overfield-Weigle action sought to be disposed of in the Delaware proceeding.

Point III

The decisions below erroneously denied the plaintiff her option to resort to the Federal Court for the relief to which she was entitled.

The complaint having alleged diversity of citizenship and the other jurisdictional requirements it was incumbent upon the District Court to retain jurisdiction and not to refer plaintiff to the State Court upon an assumption that adequate relief would be available there. The main reason for the existence of federal jurisdiction is to provide a non-resident a forum of assured impartiality. The plaintiff exercised her constitutional option in the selection of the forum. It was the obligation of the Federal Court to give effect to the exercise of such constitutional rights. *Doench Duhme & Co.* v. *Federal Deposit & Ins. Corporation,* 315 U. S. 447, 62 S. Ct. 676; *Baltimore & Ohio Railroad Co. et al.,* v. *Wabash Railroad Co.,* 119 Fed. 678, C. C. A. 7, at 680; *Bank of United States* v. *Deveaux,* 5 Cranch 61, 87, 3 L. Ed. 38.

In *Bank of United States* v. *Deveaux, supra,* Chief Justice Marshall said:

> "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description,

> it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."

The decision of the Circuit Court also results in a most anomalous situation. The District Court abdicated jurisdiction and dismissed the complaint on the assumption now established as erroneous that there would be an adequate hearing and determination in the Delaware Chancery Court. From that dismissal petitioner herein appealed to the Circuit Court of Appeals, Third Circuit, and when the appeal came on to be argued, petitioner herein pointed out to said Court the decision of the Vice Chancellor in Delaware which established how wrong was the assumption of the District Court.

Thereafter, but prior to the decision of the Circuit Court in the instant case, the Supreme Court of Delaware, handed down its decision affirming the decree of the Chancery Court which was made as above set forth without any inquiry into the merits of the settlement. Therefore at the time of the Circuit Court decision, the erroneous assumption by the District Court was not only established by the Chancery Court of Delaware but also confirmed by the Supreme Court of that state. The Circuit Court notwithstanding, held that petitioner herein was estopped by the judgment in the Delaware proceeding.

Conclusion

The amended complaint set forth a valid cause of action over which the Federal Court had jurisdiction. The motion to dismiss should have been denied and the decisions below

constituted reversible error, for which a writ of certiorari should issue.

Respectfully submitted,

LEO BRADY,
MORTIMER S. GORDON,
Attorneys for the Petitioner,
Office & P. O. Address,
44 Wall Street,
New York 5, N. Y.

STEWART LYNCH,
804 Equitable Building,
Wilmington, Delaware,
Counsel for Petitioner.

(7097)